



Submission of Evidence
to
Scottish Government Independent Review of Hate Crime Legislation
(Bracadale Review)

November 2017

Dr Kim Barker
Stirling Law School
University of Stirling
Scotland
kimberley.barker@stir.ac.uk

Dr Olga Jurasz
Open University Law School
Open University
England
olga.jurasz@open.ac.uk



Overview

The Scottish Government's *Equally Safe* strategy lists as Priority 1 that: "Scottish society embraces equality and mutual respect, and rejects all forms of violence against women and girls".¹ In recent years, a significant rise in online forms of violence against women and girls has been observed.² This includes, in particular, the widespread occurrence of online misogyny which involves the posting of online content of an abusive nature, characterized by an underlying hatred of women and / or incitement to commit acts of violence (online or offline) against women. As such, online misogyny is an example of online abusive behaviour, and can be seen as a specific form of gender-based online hate. However, despite the prevalence of online misogyny and its impact on victims, the current law does not classify misogyny as an act capable of amounting to an expression of hate or prejudice. In addition, this persistent failure of the law to account for gender-based prejudice towards women has silencing effects on the victims of online misogyny, and is a key obstacle in combatting violence against women and girls in Scotland and beyond. Therefore, in order to fully deliver on Priority 1 and to tackle online and offline misogyny, the Scottish Government must ensure that adequate legislation is enacted to prevent all forms of violence against women and girls, including those facilitated through electronic and digital means (encompassing the Internet) – such as online hate expressed through online misogyny in the form of abusive online communications.

Online violence against women is a widespread modern phenomenon which affects women and girls, and which manifests itself through various forms of abuse. This includes (but is not limited to):

- text-based abuse (e.g. on social media platforms such as Twitter or Facebook)
- upskirting
- image-based sexual abuse (also referred to as 'revenge pornography')
- rape pornography
- doxing
- cyberstalking
- cyber-harassment.

¹ CoSLA, 'Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls' (March 2016) available at: <https://beta.gov.scot/publications/equally-safe/>.

² In England and Wales alone, there were 24 prosecutions of rape pornography in 2016–17, a rise from three in 2015–16. There were 465 prosecutions commenced of the offence of disclosing private sexual images without consent (so-called 'revenge pornography') a rise from 206 in the previous year. Crown Prosecution Service, *Violence Against Women and Girls Report 2016-17. Tenth Edition* (October 2017) 16, available at: <http://www.cps.gov.uk/publications/docs/cps-vawg-report-2017.pdf>. A UK-based 2016 GirlGuiding Girls' Attitudes Survey shows that 49% of girls aged 11-16 and 44% of young women aged 17-21 do not feel free to express their views online, 50% of girls and young women aged 11-21 think that sexism is worse online than offline, with a further 23% of respondents having had threatening things said about them on social media. Girlguiding, 'Girls' Attitudes Survey 2016' 17-19, available at: <https://www.girlguiding.org.uk/globalassets/docs-and-resources/research-and-campaigns/girls-attitudes-survey-2016.pdf>.

Online forms of violence against women are frequently perceived as ‘not real’ due to the fact that abuse happens in the online sphere,³ including social media, and as such, this leads to the mistaken perception that there is no harm suffered. This dichotomy between ‘offline’ and ‘online’ is not only incorrect when it comes to combatting online violence against women but it also fails to take into account the fact that boundaries between ‘online’ and ‘offline’ aspects of everyday life are increasingly disappearing in the context of modern societies. Acts of online violence against women take place on the Internet, but their effects are not constrained to the online environment only. In fact, in many instances, acts of online violence against women can later translate into physical acts of violence. Furthermore, the anonymity of perpetrators, for instance, in cases involving text-based gendered abuse on social media platforms, heightens the fear of violence and the overall distress experienced by the victims. In cases where perpetrators have been held accountable for online abuse, the victims described their experiences of abuse as ‘life-changing’ and emphasised the damaging effects of such abuse on their lives.⁴

Focus of this Submission

The evidence in this submission is exclusively focussed on consideration of online hate and, more specifically, suggests that online misogyny should be viewed as a form of online hate. As such, this submission does not aim to answer all of the questions posed by the Review. Rather, the evidence presented here focuses on selected aspects of the consultation:

- 1) Online Hate Crime (Chapter 6), and
- 2) The Extension of the Law to Other Groups (Chapter 8).

³ K Barker and O Jurasz, ‘Gender, Human Rights and Cybercrime: Are Virtual Worlds really that different?’, in: M. Asimow, K. Brown, D. Papke (eds) *Law and Popular Culture: International Perspectives* (Cambridge: Cambridge Scholars Publishing, 2014).

⁴ *R v Nimmo and Sorley* [2014] (unreported); Emma Holten ‘Learning from revenge porn: online rights are human rights’ (2015) available at: <https://www.youtube.com/watch?v=XsvgWEdydDI&vI=en>.

Chapter 6, Part II: Online Hate Crime

Does the current law deal effectively with online hate?

The current law in Scotland does not deal effectively with online hate. There are no bespoke legal provisions which would address the specificity of online hate crime and / or online hate speech. As a result, the criminal law in Scotland has so far responded by applying existing hate offences to occurrences of online hate (where the appropriate threshold has been met).

In addition, existing misperceptions concerning harm resulting from online abuse – and online hate speech in particular – cause additional hurdles in bringing about meaningful change in relation to dealing effectively with online hate.

1) Existing legislation

Both within the United Kingdom generally and in Scotland specifically, there exist legislative provisions which can be applicable to regulation and punishment of online hate. The Malicious Communications Act 1988 (which does not apply in Scotland) introduces criminal liability for the sending of offensive communications where there is an intention to cause distress or anxiety. Section 127 Communications Act 2003 (applicable in Scotland) introduces criminal liability for an improper use of a public electronic communications network. Prosecutions made under this provision deal with messages or other matter that is “grossly offensive” or of an “indecent, obscene or menacing character”. This same section also provides that it is an offence to send or cause to be sent a false message “for the purpose of causing annoyance, inconvenience or needless anxiety to another”.

In terms of Scotland-specific legislation, section 38 Criminal Justice & Licensing (Scotland) Act (2010) offers a similar offence. However, the potential penalty under this Act (section 38(4)) is higher than the one available under section 127(1) Communications Act 2003 and amounts to a maximum of five years imprisonment and a fine.

The existing legislative framework appears to deal effectively with some isolated incidents of abusive behaviour online although fails to address instances of online hate under hate crime laws because online hate perpetrated through abusive communications currently falls outside of the current provisions. The Scots law provisions address these forms of behaviour better than the equivalent provisions in England and Wales at present but there remains room for improvement given the prevalence of abusive communications sent through multi-user platforms.

2) Online Hate & Harm

Firstly, there is a need to clarify what online hate is. Existing legislation (both UK-wide and Scotland-specific) does not define the term ‘online hate’ nor it is clarified in common law. There exists a tendency to use terms ‘online hate’ and ‘online abuse’ interchangeably, which results not only in a gross oversimplification of both phenomena but also inaccuracies in responses deployed to tackle these problems. Whilst the two issues are

indeed interrelated, 'online abuse' refers to a much broader problem and can take a multiplicity of forms, not least that of online hate speech. Furthermore, not all abuse online amounts to online hate – a specific threshold would need to be satisfied in order to classify an instance of online abuse as an emanation of online hate. For instance, looking at online violence against women, one may observe that image-based sexual abuse or doxing would amount to online abuse. However, these acts would not automatically amount to online hate. This is demonstrative of the problems other jurisdictions face when attempting to classify such behaviours under the criminal law provisions – particularly problematic in England and Wales given the current threshold for prosecution which has been criticised for being too high,⁵ and which in effect has become unworkable. This is a further example of how legal systems (and provisions) currently fail to deal effectively with online hate.

The challenge created by interchangeable terminology is a point illustrated by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion which commented on 'online abuse' more broadly, without drawing a clear distinction between online abuse, online hate speech and online hate crime.⁶ Furthermore, the Report narrowly refers to occurrences of 'bullying or hate crime through social media platforms' which fails to take into account other forms of online abuse which may, subject to the required threshold, be seen as forms of online hate.

Secondly, the dichotomy between online and offline environments needs to be challenged when addressing online hate (and online abuse in general). Traditionally, online and offline environments are viewed as separate and detached from one another. In particular, this is exacerbated by the perception that online is 'not real'⁷ which then translates into flawed attitudes towards online and offline forms of abuse and violence. Very often hate starts online, and translates into acts of violence committed offline, resulting not only in multiple harms suffered by victims but also an identifiable transference of harm between what is perceived to be the 'online' and 'offline' contexts.

Thirdly, there is a pressing need for a greater understanding and acknowledgment of harm caused by online abuse communications generally and online hate specifically.⁸ Although the vast majority of reported instances on online hate involve celebrities and public figures, it is crucial that a clear message is sent through the legal system that online hate can affect anyone, irrespective of their public status. To that end, the focus should always remain on the person affected – irrespective of their gender – rather than their public status and should be given equal importance and consideration. This approach reinforces the

⁵ A point specifically commented on in a report by Ms Marit Maij, Rapporteur of the Council of Europe Parliamentary Assembly Committee on Equality & Non-Discrimination, in her Report: 'Ending cyber-discrimination and online hate' Doc. 14217 (13 December 2016), para.32, available at: <http://bit.ly/2hX6mPA>.

⁶ Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion (September 2016) 17 (para.30).

⁷ K Barker and O Jurasz, 'Gender, Human Rights and Cybercrime: Are Virtual Worlds really that different?', in: M. Asimow, K. Brown, D. Papke (eds) *Law and Popular Culture: International Perspectives* (Cambridge: Cambridge Scholars Publishing, 2014).

⁸ K Barker and O Jurasz, 'Online misogyny as hate crime: tweeting sense, slaying trolls' (Society of Legal Scholars Conference, Dublin, September 2017).

importance and applicability of the principle of non-discrimination and equality before the law to cases involving online hate and online misogyny in particular. Furthermore, these principles are enshrined in the UK equality legislation as well as a number of international instruments which are ratified by the UK,⁹ and which therefore create legally binding obligations.

3) European perspective

The prevalent nature of online hate as well as the pressing need to tackle it across Europe has also been highlighted at a supranational level. In particular, the Council of Europe (COE) Parliamentary Assembly recognized the everyday and harrowing effects of online hate and online incitement to violence.¹⁰ Importantly, Resolution 2144 (2017) on 'Ending cyberdiscrimination and online hate' also recognised that sexism and misogyny are forms of hate speech and are as unacceptable online as they are offline.¹¹ The resolution also calls for greater recognition and addressing of the 'specificities of the online environment and of people's behaviours online', and prompted the COE member states to 'ensure that national legislation covers all forms of online incitement to violence against a person or a group of persons', including 'the full range of characteristics considered as grounds of protection under discrimination law'.

In addition, the issue of sexist hate speech (including online speech) has been identified by the Council of Europe as a form of violence against women. The COE's Gender Equality Strategy 2014-2017 identifies sexist hate speech as an obstacle to the realisation of the objective of gender equality and includes tackling sexism in the form of hate speech as one of its key objectives.¹² Importantly, the COE notes that 'although it has taken a new dimension through the Internet, the root causes of sexist hate speech preceded the technology and are fundamentally linked to the persistent unequal power relations between women and men' – a point further supports the proposal that online misogyny needs to be addressed as a form of hate speech.

Conclusion:

Hate can occur both online and offline, and both forms of it should be regulated by law. Recognition should be given to online misogyny as a form of online hate speech, which may further lead to the prosecution of such incidents as hate crimes (assuming the required threshold for prosecution is satisfied).

⁹ Examples include: Article 14 ECHR (prohibition of discrimination), Protocol 12 to the ECHR (equality before the law), Article 20 EU Charter of Fundamental Rights (equality before the law), Article 15 Convention on Elimination of All Forms of Discrimination Against Women 1979 (women's equality with men before the law), Article 3 (equal rights of men and women to the enjoyment of all civil and political rights) & Article 26 (equality before the law) International Covenant on Civil and Political Rights.

¹⁰ Council of Europe, Parliamentary Assembly Resolution 2144 (2017) 'Ending cyberdiscrimination and online hate'.

¹¹ Ibid, para.2.

¹² Council of Europe, 'Combating sexist hate speech' (2016) 2 available at: <https://edoc.coe.int/en/gender-equality/6995-combating-sexist-hate-speech.html>.

Firstly, where there is an underlying criminal act, and it is motivated by prejudice based on gender, that should be reflected in the protected characteristics of the hate crime provisions so that sentencing tariffs can be increased due to that 'gender-based prejudice.' Secondly, where there is no underlying criminal act, but where harmful behaviour (including speech) exists that reaches the relevant threshold, the law should reflect that with a new standalone offence of abusive behaviour online (to which the existing sentencing tariffs can be applied – together with the proposed new tariff of 'gender-based prejudice'). We are not advocating for all forms of speech – even offensive speech – to be classed as hate speech.

Calls for a more responsive approach of COE member states to the issue of tackling online hate are welcome and should act as a trigger for legislative and regulatory responses, including (but not limited to) the extension of protected characteristics as well as recognition of the specific nature of online misogyny as an example of online hate.

Are there specific forms of online activity which should be criminal but are not covered by the existing law?

Yes. Law should be developed to give recognition to the fact that online hate may manifest itself through various forms of online abuse, especially when abusive communications are perpetrated publically through mass communicatory platforms (including social media). In particular, online misogyny should be recognized in law as a form of online hate based on gender prejudices as it is currently falls outside the scope of characteristics protected under hate crime provisions in Scots Law.

Comment:

The widespread phenomenon of online misogyny and its serious impact on the victims stands in stark contrast with the lack of legal responses to the problem of online misogyny. The 2016 study by DEMOS which investigated the scale of misogyny on social media showed that in the period of three weeks when the study was taking place, 6500 users in the UK were targeted by 10 000 tweets of an explicitly aggressive and misogynistic nature.¹³ Internationally, these figures compare with 200 000 aggressive and misogynistic tweets sent to 80 000 persons in the same three weeks.¹⁴

Although misogyny in itself is not a new phenomenon, the Internet and technology enables the migration of misogynistic behaviours to the online realm. It is proposed that online misogyny should be viewed as a form of online hate (here being defined as an online expression, encouragement, stirring up or incitement of hatred or acts of violence against women) and could be prosecuted as a hate crime where the requisite threshold for public prosecution would apply. Whilst the authors acknowledge that responses to combatting online misogyny (and online hate in general) need to go beyond the regulatory and punitive aspects of criminal law, criminal law has a significant role to play in responding to such conduct.

Furthermore, greater legal recognition ought to be given to text-based forms of online abuse. Text-based abuse is commonplace on the Internet, especially on social media, and frequently carries misogynistic content which not only incites hatred of or violence against women in general, but also targets particular individuals.¹⁵ Whilst both image-based and text-based abuses have extensive harmful and damaging effects on the victims, only image-based sexual abuse has benefitted from a legislative appetite for reform. In recent years, we observed rapid and comprehensive legislative responses in England & Wales, and in Scotland to the increasingly common occurrence of image-based sexual abuse (also referred to as 'revenge porn'). In Scotland, Part 1, section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 introduced criminal offences for disclosing, or threatening to disclose, an intimate

¹³ The study monitored specifically the use of words 'slut' and 'whore' on Twitter: DEMOS (2016) 'The use of misogynistic terms on Twitter' available at: <https://www.demos.co.uk/wp-content/uploads/2016/05/Misogyny-online.pdf>.

¹⁴ Ibid.

¹⁵ The abuse is harmful irrespective of the prominence of the target and therefore the threshold should be set accordingly.

photograph or film. These provisions are the equivalent provisions to those located within section 33 of the Criminal Justice and Courts Act 2015 (which applies to only England & Wales). In contrast, there has been an alarming and complete lack of attention paid to text-based abuses within the context of legislative developments. Consequently, there is a misperception concerning the level and significance of harm that can be inflicted through text – especially in the context of online hate speech and online hate crime. The recent review of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 by the Post-Legislative Scrutiny Committee created a timely opportunity to address this legislative gap by extending the 2016 Act to cover text-based abuse.¹⁶

Conclusion:

Online text-based abuse should be included in legislation as a criminal offence to reflect the inclusion of other forms of online abuse, most notably image-based sexual abuse. In Scotland, this could be achieved through amendment to the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, as per the authors' recommendations submitted to the Scottish Parliament's Public Audit and Post-Legislative Scrutiny Committee.

¹⁶ This recommendation was made by the authors (Dr Kim Barker and Dr Olga Jurasz) as part of a submission to the Scottish Parliament's Public Audit and Post-Legislative Scrutiny Committee in July 2017. (A copy of the submission on file with authors and available upon request by emailing kimberley.barker@stir.ac.uk or olga.jurasz@open.ac.uk).

Should this be tackled through prosecution of individuals or regulation of social media companies or a combination of the two?

Yes. This behaviour should be tackled.

However, there is a difference between the tackling of online activity which is not (yet) criminalised, and the manner in which that is to be done. Equating prosecutions of individuals with regulation of social media platforms does not indicate that these two approaches will tackle the same harm, or indeed address issues of the seriousness of the harm suffered.

Tackling online activity presents numerous challenges – the most significant of which relate to the enforcement of measures introduced to address problematic online behaviour.

Comment:

It is not clear here what is meant (or envisaged) by ‘individuals’ nor ‘regulation’ – for example, does ‘regulation’ imply legal regulation? Does ‘users’ refer to the users(s) of a platform or the user(s) of a particular account on a particular platform (this may not necessarily be the same person – it is not uncommon for individuals to share social media accounts).

In answering whether there ought to be regulation of individuals or social media platforms, or a combination of the two, several considerations are relevant:

1) ‘Regulation’.

Criminal law is not the only potential method of ‘regulation’ that is possible. Social media platforms have offered various (limited) mechanisms to tackle some of the aspects of abusive communications.¹⁷ The phrasing of this question could mean a multitude of potential approaches. In an ideal scenario, this is something that *should* be tackled through regulation – the form of such regulation is a different (and much more complex issue).¹⁸ Regulation – in the form of law or otherwise – will still require enforcement. Therefore, whilst this is something which should be tackled, simply tackling it will not be sufficient. Addressing issues of criminal activity online requires greater legal, societal, and educational input at multiple levels.

2) Hate & Speech.

As outlined above (page 5) not all abusive messages communicated through social media platforms will be messages which satisfy the threshold (wherever that is set) for prosecution. Similarly, not all abusive messages which are sent through social media platforms will be hateful, and again, may not reach the threshold for prosecution. Those that do, may not result in a successful prosecution.

¹⁷ For example: Twitter mute buttons; Facebook moderators. Arguably these have not achieved a great level of success given the plethora of hateful / abusive incidents that are reported. Tackling extremist content has been something that platforms have been seen to be more willing to address.

¹⁸ And is entangled with questions of jurisdiction, jurisdictional competence, terms of service (and use), and enforcement.

Whilst this discussion may appear to be a matter of semantics, the ramifications of any classification of abusive messaging through social media platforms (for the sake of prosecution for example) must be given very careful consideration (especially given the difficulties of pursuing prosecutions under the current legal frameworks). An approach which is too restrictive will likely fall foul of freedom of expression rights,¹⁹ and if so, will undermine the (now) significant role social media plays in our daily interactions, thereby compounding the silencing and exclusion of women perpetrated through unchallenged online abuse that has a gender-based prejudice. Any consideration of legal regulation (and any change in the law) should rest on an assessment of the harm which is suffered as a result of the messaging, rather than an isolated reading of an abusive or hateful message, or a series of such messages.

3) Jurisdiction / Territoriality.

The issue of jurisdiction in terms of the Internet is a complicating factor in considerations of hate online. In tackling any aspect of online hate, identifying the location of the 'harm' suffered, and the location of the perpetrator of that harm²⁰ do not necessarily correlate to the same legal jurisdiction for mechanisms of redress. This problem is further compounded when suggestions of platform responsibility arise – notably for 'Internet giants' such as Twitter, Facebook and Google, which operate across physical borders, and across legal jurisdictions. Judicial decisions relating to the liability of platform providers have been made by senior courts within England & Wales,²¹ and at a European level, which indicate the existence of a liability shield for providers at present.²²

4) Platform Regulation.

Platform providers have obligations but they fall outside the scope of the current legal landscape in Scotland dealing with hate crime, and abusive communications. The question posed by the Review here implies criminalisation of platform providers based on potentially criminal acts committed by the user. This is unlikely to be a workable approach, especially given similar issues that arise in the context of liability for internet service providers – who are regarded generally as 'mere conduits'²³ under the e-Commerce framework. Arguably, social media platform providers are also 'mere conduits' and the end liability should rest with the user. It is difficult to envisage imposing workable criminal liability on social media platforms, especially where those platforms are headquartered outside of the legal jurisdiction of Scotland. However, the communication of hateful or abusive messaging is still something which is medium

¹⁹ Article 10, European Convention on Human Rights.

²⁰ Complex legal questions arise here in terms of the 'jurisdictional' competence of judicial and law-enforcement bodies. This submission does not seek to address those in any level of depth.

²¹ *R v Sheppard* [2010] 1 WLR 2779.

²² *Delfi v Estonia* (2015) ECtHR 64669/09.

²³ Article 12, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). [Hereafter e-Commerce Directive].

specific and therefore there is at the very least a moral obligation on social media platform providers to act to address some of these behaviours.²⁴

5) Holyrood Competence.

The other factor here worthy of consideration is to what extent any legislative measures aimed at regulating social media platform providers fall within the legislative competence of Holyrood. Whilst there is little doubt that criminal law provisions dealing within issues in Scotland fall within the legislative competence of Holyrood's powers, issues targeting social media platform providers by their very nature will involve some element of jurisdictional control and therefore could potentially have ramifications that stretch beyond the borders of both Scotland (and potentially the UK). Furthermore, if the Scottish Government were to consider introducing legislation to address issues of online activity which fall outside of current provisions, and these measures extend to social media platforms beyond Holyrood competence, there is a risk that were the Westminster appetite not the same, the Scottish measures could be revoked.²⁵ Similarly, were the Scottish Government to legislate on measures that would impose different provisions to those of the EU, then the Act could be one which is ultra vires.²⁶ If online abuse is to be addressed through regulation of social media platforms, that is a matter reserved to Westminster.²⁷

Prosecution of individuals.

The potential prosecution of individuals is the current approach. That said, the current approach is one which is not comprehensive, and one which relies upon an assessment of whether 'hate' is a feature of an underlying offence. In addition, there are very few prosecutions pursued for abusive communications online. There is no single reason for this, rather a multitude of factors combine to present a situation where it is difficult to succeed with a criminal prosecution.

1) *R v Nimmo & Sorley*.²⁸

Notably, criminal proceedings have been pursued in isolated incidences, the most significant of which was *R v Nimmo and Sorley*, in England & Wales which marked the first prosecution of Twitter trolls for abusive and – arguably hateful – communications under section 127 Communications Act 2003. This case gave important and long-awaited recognition to the harms caused by online abuse and the effects it has on the victims – something highlighted by Judge Riddle in his sentencing remarks.

²⁴ All users must agree to Terms of Use / Terms of Service when they register on a particular social media platform – this is a binding contractual agreement and this is one potential regulatory avenue (depending on legislative competence).

²⁵ s29(2)(a) and s29(2)(b) Scotland Act 1998.

²⁶ s29(4) Scotland Act 1998.

²⁷ Schedule 5 (Head C, Section C.10) Scotland Act 1998.

²⁸ *R v Nimmo & Sorley* (2014) (unreported).

2) Monitoring Users

The liability for individuals is currently the approach adopted under existing legal provisions across disparate legislative instruments dealing with communications offences. Tackling abusive and hateful communications should include tackling individuals who are active in sending such communications. The difficulties arise in tracking such communications and in identifying the perpetrators, particularly where accounts are anonymised. Whilst isolated prosecutions have been pursued for communications offences relating to social media – some have been pursued that deal with the harm caused through the sending of emails, notably *HMA v Isabella Jackson*²⁹ – very few cases have been heard before the courts. This is in part due to the threshold required to achieve prosecution but also due to the difficulties in conveying the harm inflicted through such communications. A further point to note here is that there is no requirement that intermediaries monitor the content posted by users.³⁰ Given the lack of monitoring requirements, it is largely down to individuals to report issues of online abuse to the relevant policing authorities. This is not in itself a problem, but it could become one if every abusive message sent was reported for investigation or potential prosecution because of the burden that it would impose on the investigatory bodies.³¹

3) COPFS Guidance

The Crown Office & Procurator Fiscal Services (COPFS) in Scotland has introduced guidance for social media prosecutions³² similar to that introduced (and refined) by Crown Prosecution Service (CPS) in England & Wales,³³ The CPS has taken the lead on this particular issue and has been more proactive than COPFS (especially given the position of CPFS in 2013 to not issue guidance³⁴) – most notably with the Director of Public Prosecutions, Alison Saunders, publically stating there is a need for a renewed emphasis in tackling issues of unlawful online behaviour and hate crimes committed through social media platforms.³⁵ Whilst this is not necessarily a significant development, it is a small measure of progress in the development of legislative reform, although the omission of gender based prejudice as a protected characteristic remains.

²⁹ *HMA v Isabella Jackson* (25 May 2017) available at: <http://www.scotland-judiciary.org.uk/8/1792/HMA-v-Isabella-Jackson>.

³⁰ Article 15 e-Commerce Directive.

³¹ This is simply due to the volume of online communications sent.

³² COPFS Social Media Prosecutions Guidance

http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Final%20version%2026%2011%2014.pdf

³³ CPS Guidance on Social Media Prosecutions

http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/.

³⁴ The Journal of the Law Society of Scotland, 'DPP Publishes Guidelines on Social Media Prosecutions' (20 June 2013) available at: <http://www.journalonline.co.uk/News/1012761.aspx#.WhAqyrCFjx4>.

³⁵ CPS, 'CPS publishes new public statements on hate crime.' (21 August 2017) available at: http://www.cps.gov.uk/news/latest_news/cps-publishes-new-public-statements/.

Social media & platform measures.

Given the pressure on social media platform providers – notably Twitter and Facebook – announcements have been made of initiatives and changes such providers have sought to implement as part of a scheme to identify and report incidents of harassment and violence. Unfortunately, the emphasis to date has fallen on aspects such as ‘hateful conduct’³⁶ or ‘terror-related content.’³⁷

1) EC Code of Conduct

In addressing issues of harassment and violence against women online, the European Commission together with ‘The IT Companies’³⁸ announced in May 2016, a ‘Code of Conduct on Illegal Hate Speech.’³⁹ This signals progress in terms of encouraging the ‘IT Companies’ to play a more responsible role in monitoring the content posted via their platforms,⁴⁰ but it is only by agreement that such initiatives have made any progress, especially because they have no legal basis nor any legal implications.

2) Muting & Moderating

Other mechanisms introduced by platforms include things like ‘mute buttons’ on Twitter⁴¹ which allow individual users to self-select what to ‘hide’ from their feed (including content which is potentially hateful, and potentially criminal).⁴² Again, whilst this is a potentially positive measure – especially as an indicator of Twitter taking the issue seriously – this is not a solution to the problem, and pays no attention to the issue of potential criminal liability. The abusive messages are not ‘removed’ if muted – they remain, but are simply hidden from the view of the person to whom they were communicated, making it all but impossible to be aware of potentially hateful or abusive communications directed at you as a target. This mechanism is therefore essentially nothing other than a silencing mechanism in action – one that is particularly damaging because of the ability to spread and share messages with ease across a sizeable audience. Similarly, other social media platforms have introduced mechanisms such as Facebook ‘Moderators’⁴³ although, again the success of this is questionable, especially given the lack of correlation to the criminal law.

³⁶ L La, ‘Twitter updates rules to combat abusive behaviour, hateful conduct’ (WIRED News, 29 December 2015) available at: <https://www.cnet.com/news/twitter-updates-rules-to-combat-abusive-behavior-hateful-conduct/>.

³⁷ BBC News, ‘Tech firms to remove extremist posts within hours’ (20 October 2017) available at: <http://www.bbc.co.uk/news/technology-41693777>.

³⁸ Notably Facebook, YouTube, Twitter & Microsoft.

³⁹ EU Commission, ‘EU Commission and IT Companies announce Code of Conduct on Illegal Online Hate Speech’ (31 May 2016) available at: http://europa.eu/rapid/press-release_IP-16-1937_en.htm.

⁴⁰ Although they are under no legal obligation to do so under Article 15 e-Commerce Directive.

⁴¹ @ptr, ‘Another way to edit your Twitter experience: with mute’ (12 May 2014) available at: https://blog.twitter.com/official/en_us/a/2014/another-way-to-edit-your-twitter-experience-with-mute.html.

⁴² Muting and moderating aspects of social media sites are permitted because under European law, there is no monitoring obligation placed on intermediaries to monitor content. Any change in legislation within Scotland to alter this position will be contradictory to Article 15 e-Commerce Directive.

⁴³ O Solon, ‘Facebook is hiring moderators. But is the job too gruesome to handle?’ (The Guardian, 4 May 2017) available at: <https://www.theguardian.com/technology/2017/may/04/facebook-content-moderators-ptsd-psychological-dangers>.

3) Social Media Code of Conduct

In tackling unlawful conduct online, the Westminster Government has considered several approaches (which may have an impact on Scots Law). One of these is a code of practice for online and social media platform providers.⁴⁴ This code of practice will 'give guidance' on when it may be appropriate to take action against the use of platforms for pursuing bullying or insulting behaviour.⁴⁵ However, the code of practice is not designed to address behaviour which is unlawful conduct,⁴⁶ again raising the question of *where* the distinction is to be made between conduct which is offensive yet legal, and that which is unlawful – no clarity is provided in the legislation either.

Conclusion:

This type of behaviour is something which cannot be addressed solely from one dimension. Criminal offences are defined as those acts or omissions which are so harmful that the wrong is perceived to be against the state rather than the individual who has suffered as a result of the act (or omission).⁴⁷ Thus, this indicates that regulation ought to be pursued against social media platforms too – and criminal regulation is not to be prohibited.

In tackling hate online, prosecution of individuals *and* regulation of social media platforms is required. The caveat – and it is a significant one – is whether or not such platform regulation is enforceable, and whether potential prosecutions are actionable.

⁴⁴ s103(1) Digital Economy Act (DEA) 2017, although note that this provision also applies to Scotland.

⁴⁵ s102 and s103(3)(c) DEA 2017.

⁴⁶ s104 DEA 2017.

⁴⁷ House of Lords Select Committee on Communications, Paper 37 (2014-15): available at: <https://publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/37.pdf> 9.

Chapter 6 – Online Hate Recommendations.

- Combatting online hate requires multilevel and multi-stakeholder input.
 - This includes the pressing need for law reform on offences involving online communications and online hate, but also requires social and educational measures.
- The Scots law provisions applicable to offences involving online communications and online hate should be improved to better tackle abusive communications sent through multi-user platforms.
 - In particular, online text-based abuse should be included in legislation as a criminal offence to reflect the inclusion of other forms of online abuse, most notably image-based sexual abuse.
- The approach to regulation and tackling of online hate should be twofold and involve:
 - a) liability of individuals who post hateful content online, and;
 - b) greater liability of platform providers.

However, questions remain regarding the enforceability of platform regulation, and whether potential prosecutions are actionable.

Chapter 8: Should the law be extended to other groups?

Do you consider any change to existing criminal law is required to ensure that there is clarity about when bullying behaviour based on prejudice becomes a hate crime?

Yes. The current law does not currently address all potential situations of bullying based on prejudice. This is especially the situation when dealing with online bullying behaviour, but is also the situation because certain 'prejudices' are not regarded as those which are actionable under the criminal law – especially prejudices which are based on gender.

1) Threshold for Action.

The first difficulty here is in determining the point at which behaviour is regarded as 'bullying' and, the point at which 'bullying' reaches the threshold for criminal proceedings to be brought. Both the Crown Prosecution Service (CPS) in England & Wales,⁴⁸ and the Crown Office & Procurator Fiscal Services (COPFS) in Scotland⁴⁹ have introduced guidance on prosecutions relating to social media which in some respects address aspects of behaviour online that can be regarded as 'bullying.' Both of these sets of guidelines indicate that there has to be some element of public interest in any criminal proceedings pursued, but beyond that, there still has to be prosecutorial discretion.

2) Interchangeable Terminology.

Secondly, difficulties arise concerning what is meant by 'bullying' and whether or not there is a variation of this definition when online behaviour is considered. As the House of Lords has indicated, it is particularly challenging to identify and focus on set terms and definitions – especially when there are multiple definitions offered for what is essentially the same form of behaviour online (for example, cyberbullying, trolling, virtual mobbing).⁵⁰ Significantly, this list of definitions is very similar to the list found in the guidelines for social media prosecutions – a fact which indicates the need for a clarity of approach to situations when bullying based on prejudice becomes a criminal act.

3) Legal Tests.

Thirdly, in addition to interchangeability of terms relating to bullying behaviours, the terms for the legal tests seem to be referred to interchangeably as well – especially when it comes to identifying the threshold for potential prosecutions (e.g. ill-will, malice, prejudice). The critical point here is that whilst there is a need for an underlying

⁴⁸ CPS Guidance on Social Media Prosecutions
http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/.

⁴⁹ COPFS Social Media Prosecutions Guidance
http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Final%20version%2026%2011%2014.pdf.

⁵⁰ House of Lords Select Committee on Communications, Paper 37 (2014-15): available at:
<https://publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/37.pdf> 9.

criminal act in order for a hate crime to be considered, there is not necessarily the need for an underlying criminal act for bullying – and bullying on its own may not necessarily give rise to criminal responsibility.

4) Bullying v Hate.

Fourthly, part of the consideration of the distinction between bullying and hate requires consideration of the level of harm suffered, especially in terms of the impact of that harm on the sufferer. This too indicates the importance of identifying the kind of behaviour – bullying may give rise to hate but it may not on its own be a criminal act or omission. Where patterns of behaviour are considered, questions will naturally arise as to the motivation of the accused, and this too is relevant to the level of harm suffered.

Conclusion:

Part of the consideration given to the distinctions between bullying and hate has to pay attention to the harm and the intended harm caused – not least because clamping down on speech or communications or behaviour which is unpleasant is not necessarily the same as clamping down on speech which is hateful and / or criminal. Clarity is required concerning which prejudices are protected, and the threshold at which these prejudices give rise to behaviour which is allegedly criminal.

Do you think that specific legislation should be created to deal with offences involving malice or ill-will based on:

- age
- gender
- immigration status
- socioeconomic status
- membership of gypsy / traveller community
- other groups (please specify).

For each group in respect of which you consider specific legislation is necessary, please indicate why and what you think the legislation should cover.

Yes. Specific legislation dealing with offences involving malice or ill-will based on gender should be created in Scots Law. Gender should also be added to existing categories of hate crime, irrespective of its online or offline nature.

Comment:

Where misogynistic online abuse is concerned, specific legislation to cover offences involving text-based abuse (including online misogyny) should be created. Misogynistic text-based abuse is not only a form of online hate speech, but frequently amounts to incitement of hatred towards women as well as to the commission of acts of violence against a particular woman (or women in general). Nonetheless, the law has been slow in responding to this problem and the broader impact it has on women, and the law has appeared reluctant to add gender as a protected characteristic in the context of hate crime despite the existence of similar provisions under equality legislation.⁵¹

Finally, several police forces in England and Wales have recently announced that they will be recording incidents of hate crime with additional labels⁵² – notably as misogynistic incidents. This seems to be a significant step forward in terms of the recognition of gender-based abuses more broadly but, unfortunately, this results *only* in the recording of offences locally.⁵³ The labelling and ‘flagging’ of such incidents bears no correlation to the prosecution of crimes on a similar basis – and, indeed, this is impossible under hate crime laws in England & Wales, and Scotland, because gender is not a protected characteristic. As such, whilst police forces may be willing to record potential crimes as gender-based hate crimes, this is something which is legally unfounded and has no bearing on the judicial system, as the recording has no impact upon prosecution rates, nor the pursuit of prosecutions. This behaviour is, therefore, at best,

⁵¹ s11 Equality Act 2010.

⁵² E Ashcroft, ‘Cat-calling and wolf-whistling now classed as gender-hate crimes by Avon and Somerset Police’ (Bristol Post, 16 October 2017) <http://bit.ly/2gBpUg1>; M Townsend, ‘Police in England and Wales consider making misogyny a hate crime’ (The Guardian, 10 September 2016) available at: <https://www.theguardian.com/society/2016/sep/10/misogyny-hate-crime-nottingham-police-crackdown>; Nottinghamshire Police, ‘Hate crime’ <https://www.nottinghamshire.police.uk/hatecrime>.

⁵³ We are not suggesting that Police Scotland follow these examples.

a matter of identification, although there does not appear to be any shared nor any transparent basis on which various police forces are making such recordings.

Conclusion:

Gender needs to be incorporated as a protected characteristic in hate crime legislation in order to capture (and prosecute, where applicable) instances of online (and offline) misogyny. Whilst current protected categories include sexual orientation and transgender identity, the current hate crime legislation does not provide legal avenues for addressing misogyny as a hate crime. This not only stands in contrast to equality legislation in the UK, but also raises significant concerns from the perspective of preventing and combating violence against women, and ensuring gender equality.



Chapter 8 – Extending the Law Recommendations.

- Specific legislation dealing with offences involving malice or ill-will based on gender prejudice should be created in Scots Law.
- Gender should be incorporated as a protected characteristic in hate crime legislation in Scotland.
 - This would create legal avenues for addressing misogyny as a hate crime but also allow compliance with existing equality legislation at national and international levels.
- Further clarification is needed with regard to when bullying based on prejudice becomes hate.
 - An assessment of the harm suffered, as well as the intention behind causing harm should be predominant factors used to determine the threshold for bullying based on prejudice being considered as hate.

However, where bullying behaviour based on prejudice is to be considered as a hate crime, there would be a need for underlying criminal conduct.